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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LARRY HANCOCK, Defendant and Appellant.	C082644 (Super. Ct. No. 16FE012924)

After defendant Larry Hancock pleaded no contest to possession of methamphetamine for sale, (Health & Saf. Code, § 11378) the trial court granted him five years' probation. On appeal, defendant contends the imposition of an electronics search condition as a condition of his probation is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). We agree with defendant. Accordingly, we strike the electronics search condition from the probation order and affirm the judgment as modified.

BACKGROUND

The record contains few facts related to the commission of this offense. Defendant pleaded no contest prior to a preliminary hearing, the parties stipulated to a factual basis for the plea without stating any facts, and defendant waived preparation of a probation report. In sum, defendant possessed 24 grams of methamphetamine. He pleaded no contest to possession of methamphetamine for sale. The trial court granted defendant five years' probation, conditioned on his serving 365 days in jail, with 36 days of credit for time served.

At the plea hearing, defense counsel objected to the imposition of the electronics search condition under *Lent, supra* 15 Cal.3d 481, stating there was no connection to any electronics, no electronics were seized in this case, and if they were seized, they were not searched.

Both defense counsel and the prosecution filed boilerplate briefs on the validity and constitutionality of the condition. Attached to the People's brief was a declaration from a Sacramento County Sheriff's Deputy, who was assigned to the Sacramento Valley Hi-Tech Crimes Task Force, Sean E. Smith. The declaration indicates generally Smith's background and experience as a peace officer and delineates the type of evidence that may be found on electronic devices as to various categories of criminal offenses, including drug sale offenses. As to drug sale offenses, Smith declared those who engage in drug sales may keep records of the sales on their electronic devices; take photographs of the narcotics; use their cellular devices to communicate with customers, coconspirators, or competitors; use social media to post videos, pictures, and commentary of their illegal conduct; and geolocation data may be used to place a suspect at a given time and location. The declaration also delineates, in general terms, the law enforcement need to have complete access to electronic devices, including all the contents and all passwords. Neither the prosecution's opposition nor Smith's declaration contains any arguments or information specific to this defendant, his criminal background, or the

particular offense he committed. The trial court imposed the electronics search condition.[1]

DISCUSSION

Electronics Search Condition

Defendant contends the electronics search condition imposed in this case is invalid under *Lent, supra,* 15 Cal.3d 481, because the condition is not related to the current offense, the conduct to which the condition relates is not, in itself, criminal, and the condition is not related to future criminal conduct.

We review conditions of probation for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*Lent, supra*, 15 Cal.3d at p. 486, fn. omitted.) "The *Lent* test 'is conjunctive — all three prongs must be satisfied before a reviewing court will invalidate a probation term.' (*Olguin, supra*, 45 Cal.4th at p. 379.)" (*In re Ricardo P*. (2019) 7 Cal.5th 1113, 1118 (*Ricardo P*.).) Accordingly, even if the probation condition is unrelated to the crime defendant was convicted of committing and relates to conduct, not itself criminal, "the condition is valid

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[1] The probation condition imposed states: "P.C. 1546 searchable — Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phone and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further consent. [¶] Defendant being advised of his/her constitutional and statutory rights pursuant to Penal Code section 1546 et seq. in this regard, and having accepted probation, is deemed to have waived same and also specifically consented to searches of his/her electronic storage devices. [¶] Defendant shall provide acces[s] to any electronic storage devices and data contained therein, including disclosing and providing any and all [information] necessary to conduct a search."

as long as the condition is reasonably related to preventing future criminality. [Citation.]" (*Olguin*, at p. 380.)

Recently, the California Supreme Court clarified the parameters of the *Lent* test's third prong, whether the condition " ' 'requires or forbids conduct which is not reasonably related to future criminality.' " [Citation.]" (*Ricardo P., supra*, 7 Cal.5th at p. 1119.) *In Ricardo P*., the minor was granted probation after admitting to two counts of burglary. The juvenile court imposed drug conditions because the minor had indicated he had previously smoked marijuana, and imposed a condition requiring the minor "submit to warrantless searches of his electronic devices, including any electronic accounts that could be accessed through these devices." (*Id.* at p. 1115.) Nothing in the record indicated the minor had ever used electronic devises to commit, plan, discuss or consider criminal conduct. Nonetheless, the juvenile court imposed the electronics search condition based on its own "observation that teenagers 'typically' brag about such drug use on social media." (*Id.* at pp. 1117, 1119.) Although the Supreme Court was skeptical about generalization about teenagers' tendency to brag about drug use on social media, the Supreme Court found even accepting that premise as true, *Lent*'s third prong was not satisfied by an abstract or hypothetical relationship between the probation condition and preventing future criminality. (*Id.* at pp. 1119-1120.)

The Supreme Court also found the third prong of the *Lent* test "contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition. [Citation.]" (*Ricardo P., supra*, 7 Cal.5th at pp. 1122-1123.) This condition significantly burdened the minor's privacy interests, given how much sensitive and confidential information can be accessed on devices such as cell phones and the limited justification for the condition did not support such a significant burden. (*Ibid*.) Accordingly, the Supreme Court found the electronics search condition was not reasonably related to future criminality and was therefore, invalid under *Lent, supra,* 15 Cal.3d 481. In so doing, the Supreme Court expressly noted its

determination was not a blanket invalidation of all such conditions, as there might be cases in which "the probationer's offense or personal history may provide the . . . court with a sufficient factual basis from which it can determine that an electronics search condition is a proportional means of deterring the probationer from future criminality. [Citations.]" (*Ricardo P.*, at pp. 1128-1129.)

As in *Ricardo P.*, only the third prong of the *Lent* test is at issue here. The factual basis for the plea indicates only that defendant possessed 24 grams of methamphetamine for sale. There is no probation report and no evidence regarding any personal history of defendant. Nothing in the record indicates defendant used an electronic device in committing this offense or had any history of using electronic devices to commit, facilitate or plan criminal conduct, or of using social media to demonstrate he had committed such conduct. The only support for the condition in the record is Smith's generalized declaration, unrelated to either defendant or his specific offense, that those who commit drug sales offenses often use electronic devices to keep records of the sales, take photographs of the narcotics, communicate with customers, coconspirators, or competitors, and use social media to post videos, pictures, and commentary of their illegal conduct, and that geolocation data may be used to place a suspect at a given time and location. Even presuming these assertions as true, these generalized, hypothetical statements do not satisfy the requirements of *Lent, supra,* 15 Cal.3d 481, as clarified in *Ricardo P.*

We disagree with the dissent's claim that Detective Smith's declaration is "expert opinion evidence of how narcotics trafficking offenses are committed, which provided a definite 'indication' that defendant would *need* to use electronic communication devices to go back into business." (Dis. opn. *post,* at p. 6, italics added.) Detective Smith's declaration does not say that narcotics traffickers *in fact* use, or *must* use,

electronic communication[2] devices to sell drugs, rather, it says they *may* or *often* or *commonly* use them. People can, and have, sold drugs without utilizing electronic communication devices.[3] These assertions regarding what a narcotics trafficker *may* do are one part of a larger general boilerplate affidavit that applies the same speculative language to a wide range of other criminal offenses including fraud, identity theft, financial crimes, sex offenses, human trafficking, pimping and pandering, and those engaged in weapons-related offenses and gang offenses.

While electronic communication devices may generally facilitate the commission of each of these categories of criminal offenses, without a connection to the defendant's particular criminal conduct or personal history, those generalizations do not provide a concrete connection between the search condition and future criminality *by defendant*. And, without evidence in our record that this defendant utilized such devices, or even had such devices, in some fashion related to these sales, the declaration does not satisfy the requirements of *Ricardo P*. Because the declaration is devoid of any connection to this defendant, his personal history, or the manner in which this crime was committed, it does not provide evidence that the search condition will deter defendant from engaging in a future crime or deter future narcotics trafficking activity by defendant or that monitoring his communication devices will effectively put defendant out of business. (Dis. opn. *post*, at p. 8.)

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[2] Because the dissent focuses its discussion on the communication aspect of the devices and the ability of law enforcement to monitor that communication, we use that nomenclature in addressing the dissent. (Dis. opn. *post*, at p. 7, fn. 7.)

[3] The specific statute defendant was convicted of violating here was enacted in 1972. Other laws prohibiting narcotics trafficking and sale of controlled substances have been on the books since as early as the 1920's. (See *People v. Broad* (1932) 216 Cal. 1; *People v. Fong Wot* (1923) 63 Cal.App. 677.) These laws significantly predate the existence and widespread use of the electronic communication devices at issue in this search condition.

As to the proportionality calculus, because the declaration only generically discusses how some narcotics (and many other) offenses may be committed, the deterrent effect of the search condition based on this evidence can only be abstract and hypothetical. Thus, this case falls squarely within the concerns articulated in *Ricardo P.*, "If we were to find this record sufficient to sustain the probation condition at issue, it is difficult to conceive of any case in which a comparable condition could not be imposed, especially given the constant and pervasive use of electronic devices and social media . . . today. In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct. . . . Indeed, whatever crime a [probationer] might have committed, it could be said that [probationers] may use electronic devices and social media to mention or brag about their illicit activities." (*Ricardo P., supra*, 7 Cal.5th at p. 1123.) If Smith's generalized and hypothetical declaration "were sufficient to justify the substantial burdens the condition imposes, it is hard to see what would be left of *Lent*'s third prong." (*Id.* at p. 1124.) Accordingly, we conclude this condition is not reasonably related to future criminality and is therefore invalid under *Lent.* (*Lent, supra*, 15 Cal.3d at p. 486.) Having determined this condition is invalid under *Lent*, we need not address defendant's additional claims challenging the condition.

DISPOSITION

The trial court is directed to issue an amended probation order striking the electronics search condition. As modified, the judgment is affirmed.

/s/
HOCH, J.

I concur:

/s/
KRAUSE, J.

MURRAY, Acting P.J., Dissenting.

I respectfully dissent. In this possession of narcotics for sale case, the trial court was presented with evidence in the form of expert opinion establishing that narcotics traffickers use cellular phones and computers to sell drugs. This case, therefore, presents far more than the abstract or hypothetical relationship between an electronic search condition and the prevention of future criminality about which the court in *In re Ricardo P.* (2019) 7 Cal.5th 1113 (*Ricardo P.*), was concerned. And an electronic search condition allowing monitoring of defendant's electronic devices for communications related to narcotics trafficking activity would have served to deter defendant from engaging in such activity in the future. Thus, the search condition, to the extent it would have served that purpose, was not disproportionate to the imposition on defendant's privacy interests; it would not have imposed "*substantially greater burdens on the probationer than the circumstances warrant*." (*Id.* at p. 1128, italics added.)

But as I explain, because the unlimited access provided by the search condition is constitutionally overbroad, I would remand to allow the court to narrowly tailor it.

I. The *Lent* Test and the *Ricardo P.* Proportionality Requirement

In *Ricardo P.*, our high court applied and clarified the test from *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*). Under that test, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' " (*Ricardo P., supra,* 7 Cal.5th 1113, 1118.) The court in *Ricardo P.* addressed the third prong, as we do here.

In *Ricardo P.*, the juvenile court found the electronic search condition necessary to monitor the minor's drug usage — even though no evidence showed the minor had used electronic devices in committing his burglaries. Instead, the juvenile court relied on the minor's statements in the probation report about using marijuana and its own opinion that

minors brag about marijuana and drug use on the Internet. (*Ricardo P.*, *supra*, 7 Cal.5th 1117.) The *Ricardo P.* court held the condition invalid, reasoning that the third *Lent* prong was satisfied, "because, on the record before us, the burden it imposes on Ricardo's privacy is substantially disproportionate to the countervailing interests of furthering his rehabilitation and protecting society." (*Id.* at p. 1119.)

Three things are different here: (1) The nature of the conviction offense, (2) the nature of the information in the record and available to the trial court and (3) the proportionality calculus. As to the proportionality calculus, the search condition here will deter defendant from engaging in a future crime. Specifically, it would deter future narcotics trafficking activity by monitoring his electronic devices for narcotics related communications and thus effectively take away a tool of the trade. Given how narcotics trafficking offenses are committed, this deterrence is not abstract or hypothetical.

The majority here concludes: "This case falls squarely within the concerns articulated in" *In re Ricardo P.* (Maj. opn. *ante*, at p. 7.) It reasons that because there was no evidence that defendant used an electronic communication device in his conviction offense, nor was there evidence in his personal history justifying the search condition, the condition fails under the third *Lent* prong. (Maj. opn. *ante*, at pp. 6-7.)

I do not read *Ricardo P.* that restrictively. I agree "there must be information in the record establishing *a connection between the search condition and the probationer's criminal conduct* or personal history — *an actual connection apparent in the evidence*, not one that is just abstract or hypothetical." (*In re Alonzo M.* (2019) 40 Cal.App.5th 156, 166 (*Alonzo M.*), italics added [discussing *Ricardo P.*].) But a close reading of *Ricardo P.* reveals the court's principle concern was proportionality between the burdens imposed and the interest served by the electronic search condition. The connection between the search condition and a defendant's criminal conduct or personal history is merely part of the proportionality calculus establishing the reasonableness of the search condition. As the *Ricardo P.* court reasoned, "*Lent* is an interpretation of the

Legislature's requirement that probation conditions be 'reasonable' " under Penal Code section 1203.1, subdivision (j)[1] and "a probation condition that imposes *substantially greater burdens on the probationer than the circumstances warrant* is not a 'reasonable' one.' " (*Ricardo P., supra,* 7 Cal.5th at p. 1128, italics added; see also *People v. Bryant* (2019) 42 Cal.App.5th 839, 844 ["*Lent's* future criminality prong 'contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition' "].)

While evidence of prior electronic communication device usage can establish such proportionality, it is not the only way. The *nature of the conviction offense* combined with evidence that the search condition will deter the commission of the same or similar offense in the future can also satisfy the proportionality requirement for *Lent's* third prong.[2]

Indeed, the *Ricardo P.* court cited several pre-*Lent* cases as examples of cases where there was a sufficiently "close[] relationship between the probation condition on one hand and the probationer's criminal conduct and deterring future criminality on the other." (*Ricardo, P., supra,* 7 Cal.5th at pp. 1120-1121.) One such case was *People v. Mason* (1971) 5 Cal.3d 759 (*Mason*), where the court relied on the nature of the

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[1] Penal Code section 1203.1, subdivision (j) provides in pertinent part: "The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other *reasonable conditions*, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." (Italics added.)

[2] This is not to say that the focus should be on the precise way a defendant committed the conviction offense. As the *Ricardo P.* court noted: "Requiring a nexus between the condition and the underlying offense would essentially fold *Lent's* third prong into its first prong. *We have said that 'conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender's precise crime*.' " (*Ricardo P., supra,* 7 Cal.5th at p. 1122, italics added.)

conviction offense. About *Mason*, the *Ricardo P*. court wrote: "In *Mason* [citation], we determined that the validity of a condition requiring a 'prior narcotics offender' to submit to warrantless property searches 'seems beyond dispute . . . since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses.' [Citation.] We relied on case law holding that 'such a condition is reasonable and valid' because it is " 'related to [the probationer's] reformation and rehabilitation *in the light of the offense of which he was convicted*." ' " (*Ricardo P*., at pp. 1120-1121, italics added.)[3]

Further illustrating the *Ricardo P.* court's concern with proportionality is its reliance on *People v. Fritchey* (1992) 2 Cal.App.4th 829, 837-838. It quoted *Fritchey's* observation: " ' "[A] reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not extreme, not demanding too much, well-balanced." ' " (*Ricardo P*., *supra*, 7 Cal.5th at p. 1122.)

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[3] In *Mason*, our high court addressed the legality of a search conducted at defendant's home. (*Mason*, *supra*, 5 Cal.3d 759, 761). At issue was the validity of the search condition that authorized the search. (*Id*. at p. 763.) Applying what would later be referred to as the *Lent* test, but had previously been applied in *In re Bushman* (1970) 1 Cal.3d 767, 776, the *Mason* court wrote: " 'A condition of probation imposed pursuant to Penal Code section 1203.1 is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality. [Citation.]' [¶] It seems beyond dispute that a condition of probation which requires a prior narcotics offender to submit to a search meets the test set forth in *Bushman*, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. Indeed, the cases have held that such a condition is reasonable and valid, being 'related to (the probationer's) reformation and rehabilitation *in the light of the offense* of which he was convicted.' " (*Mason*, at p. 764.)

Thus, the absence of evidence of prior electronic device use by defendant is not dispositive.[4] It is the proportionality between the search condition's purpose of deterring future criminality and the imposition on defendant's privacy upon which we must focus — a determination to be made in light of the nature of defendant's conviction offense and all of the evidence available to the trial court. And as I next discuss, the record here establishes such proportionality.

II. Proportionality of Electronic Search Conditions and Deterrence of Future Narcotics Trafficking

Here, the information available to the trial court upon which to base imposition of an electronic search condition was quite different than in *Ricardo P*. The trial court here had actual expert opinion evidence about how narcotics trafficking offenses are committed — specifically that drug traffickers commonly use electronic communication devices to communicate with buyers and suppliers. This evidence provided a concrete connection between the search condition and the deterrence of future narcotics trafficking by defendant.

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[4] The majority summarizes the *Ricardo P*. discussion in a way I think misses the focus on proportionality. The majority states: "Although the Supreme Court was skeptical about generalization about teenagers' tendency to brag about drug use on social media, the Supreme Court found even accepting that premise as true, *Lent*'s third prong was not satisfied by an abstract or hypothetical relationship between the probation condition and preventing future criminality. (*Id.* at pp. 1119-1120.)" (Maj. opn. *ante*, at p. 4.) This summary apparently comes from the following excerpt in *Ricardo P*.: "But even accepting these premises, we conclude that the electronics search condition here satisfies *Lent's* third prong, such that the condition is invalid under *Lent, because the burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use*." (*Ricardo P*., *supra*, 7 Cal.5th at 1119-1120, italics added.) By failing to take into account the italicized language from *Ricardo P*., the majority misses the point of that court's rejection of the juvenile court's reason for imposing the search condition: that notwithstanding the juvenile court's reasoning, the search condition did not satisfy the third prong of *Lent* for the reason that its burden on privacy *"is substantially disproportionate to the condition's goal of monitoring and deterring drug use*." (*Id.* at pp. 1119-1120, italics added.)

The majority, in concluding "[t]his case falls squarely within the concerns articulated in *Ricardo P.*," cites our high court's reasoning: "If we were to find *this record* sufficient to sustain the probation condition at issue, it is difficult to conceive of any case in which a comparable condition could not be imposed, especially given the constant and pervasive use of electronic devices and social media by juveniles today. In virtually every case, *one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct*." (*Ricardo P., supra,* 7 Cal.5th at p. 1123, italics added.) (Maj. opn. *ante*, at p. 7.)

This language actually illustrates the significant difference between the record in *Ricardo P.* and the record here. The *Ricardo P.* court observed the record there contained "*no indication* that Ricardo . . . will use electronic devises in connection with drugs or any illegal activity" and thus was "insufficient to justify the substantial burdens imposed by th[e] electronics search condition." (*Ricardo, P., supra*, 7 Cal.5th at p. 1116, italics added.) Here, however, the record contained expert opinion evidence of how narcotics trafficking offenses are committed, which provided a definite "indication" that defendant would need to use electronic communication devices to go back into business. This is far more than a mere hypothesis.

The expert opinion evidence here is found in a detective's declaration, stating that based on the detective's training and experience: "Cellular telephone devices and/or tablets are *commonly used to communicate with customers, co-conspirators,*[5] or competing narcotics traffickers via several different methods. Criminals often use simple text messaging applications, cellular telephone calls, email, instant/direct messaging functions within social media applications, or chat functions within various applications to do so. Contact lists often contain names and telephone numbers of co-conspirators,

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[5] I understand the reference to "co-conspirators" to be a shorthand for describing suppliers and other people with whom the seller is involved in selling drugs.

customers and competing narcotics traffickers."[6] (Italics added.) Given the evidence concerning narcotics trafficking-related communications, the relationship between the search condition and preventing future criminality here renders *Ricardo P.* distinguishable. In my view, there is nothing abstract or hypothetical about the fact that narcotics traffickers must communicate with buyers and suppliers to engage in the trade.[7] As such, the condition is not one that might *hypothetically* deter future conduct merely

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[6] The detective, a peace officer with the Sacramento County Sheriff's Department for over 20 years, had served in a variety of capacities, including patrol and as a detective in the Sacramento Valley Hi Tech Crimes Task Force. The detective had investigated crimes including "narcotic and other controlled substance violations" and conducted forensic examinations of digital media storage devices and cellular telephones in connection with the investigation of a variety of crimes, including "narcotics sales." Additionally, the detective taught other law enforcement officers and prosecutors on tech related subjects, including "Cellular Telephone Forensics" and "social network investigations."

[7] The detective's declaration also stated: "Narcotics traffickers/transporters also use electronic devices to access their social media pages and post videos, pictures, comments and locations of activity related to their illegal activities. I have personally searched electronic devices where such evidence was found." However, I focus my discussion on the fact that the electronic search condition here would have allowed probation officers to monitor defendant's communications to determine if he is engaged in narcotics trafficking activity while on probation. That purpose is proportionate to defendant's privacy interests and thus reasonably related to future criminality. The *Ricardo P.* court's reasoning that the search condition there was based on the idea that it "*might* deter" future conduct merely because it "*could* reveal evidence" (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1123, italics added) causes me pause with regard to social media, photographs and geolocation data. Arguably, providing access to such apps, even when based on the expert opinion here, might fall within the scope of *Ricardo P.*'s concern about abstract and hypothetical connections to a defendant's future criminal conduct. To do business, narcotics traffickers do not have to take photographs of their drugs and money, keep electronic records, or use Facebook to tell people where they will be. But they do have to communicate directly with suppliers and customers, and the way that is commonly done, based on the evidence, is by electronic communication devices. Thus, a search condition allowing the monitoring of communications for evidence of narcotics trafficking would not only reveal evidence of the commission of a crime but would actually deter the commission of narcotics trafficking crimes.

because it "*could* reveal evidence." (*Ricardo P., supra,* 7 Cal.5th at p. 1123, italics added.) Instead, it *will* deter future conduct by effectively eliminating an essential tool of the trade. Monitoring electronic communications on devices over which defendant has control, as a practical matter, will effectively put him out of business.

The majority dismisses the expert opinion evidence as a "generalized, hypothetical statement[]," implying that such opinion evidence is no better than the juvenile court's observation in *Ricardo P.* (Maj. opn. *ante,* at p. 5.) But courts have long accepted such expert opinion as part of search warrant affidavits seeking to search places for narcotics and evidence of trafficking. (*People v. Cleland* (1990) 225 Cal.App.3d 388 ["a seizure of a significant amount of contraband from a suspect's person [while he was away from his home], combined with an expert's opinion as to the likelihood that additional contraband might be found at that suspect's residence, *can* justify the issuance of a search warrant for that suspect's residence"]; *People v. Johnson* (1971) 21 Cal.App.3d 235, 245 ["officer's opinion was competent, relevant evidence which when coupled with the equally competent and relevant evidence of the circumstances of the previous seizure constituted quantitatively sufficient support for the magistrates finding"]; *United States v. Terry* (9th Cir. 1990) 911 F.2d 272, 275-276 [" 'a magistrate may rely on the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found' "].)[8] In these cases, the key facts supporting probable cause for Fourth Amendment purposes were: (1) the defendant's possession of drugs for sale at some

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[8] Expert opinion in search warrant affidavits has also been used in other kinds of cases to support probable cause. (E.g., *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1106 [murder prosecution; the affiant officer noted that based on his experience, persons often use the Internet to gather information concerning victims]; *People v. Spears* (1991) 228 Cal.App.3d 1, 17-18 [murder prosecution; court noted an officer's law enforcement experience may be considered by the magistrate in determining whether or not the affidavit is sufficient; inferences or deductions apparent to trained law enforcement officers may be considered].)

location away from the home and (2) the affiant's expert opinion that more drugs would be found in the defendants' homes. Similarly, here we have a defendant caught with a substantial amount of drugs coupled with the expert's opinion explaining how narcotics traffickers use electronic communication devices to conduct business. The type of information here — validly considered for search warrants and probable cause determinations — is decidedly different than the "nebulous concern" upon which the juvenile court in *Ricardo P*. acted. (See *Alonzo M*., *supra*, 40 Cal.App.5th at p. 166 [describing the *Ricardo P.* court's concern].)

The majority downplays the significance of Detective Smith's expert opinion, noting that "people can, and have, sold drugs without utilizing electronic communication devices" and then goes on to note: "the specific statute defendant was convicted of violating here was enacted in 1972. Other laws prohibiting narcotics trafficking and sale of controlled substances have been on the books since as early as the 1920's." (Maj. opn. *ante*, at p. 6, fn. 3.) Although there is no evidence in the record here about how drugs historically may have been trafficked and sold, I agree that in days gone by, the trafficking of illegal drugs was done differently than now. But today, as opposed to in 1972, one can take judicial notice that the most common communication device is a cellular phone, not the landlines and pay phones that may have been used in the past. (See *Riley v. California* (2014) 573 U.S. 373, 385 [189 L.Ed.2d 430] (*Riley*) [discussing the ubiquitous nature of cellular phones, noting that they are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"].) And as the detective stated in the declaration, electronic communication devices are "*commonly used* to communicate" with buyers and suppliers.[9] The majority also takes issue with my observation that defendant would *need*

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[9] Before *Ricardo P.*, I believe it would have gone without question that a trial court judge could make sentencing decisions based the judge's own training and experience

to use electronic communication devices to go back into business. That inference, I think, is a fair one and not at all hypothetical given that narcotics traffickers *need to communicate* with the people they obtain supplies from and the people they sell to.

With the connection to future narcotics trafficking specific, and not generalized or hypothetical, I would conclude that, given the expert opinion evidence, the search condition here is reasonable under section 1203.1. It is connected to and proportionate to the goal of ensuring defendant is no longer involved in that enterprise. Similar to the residential search condition in *Mason*, *supra*, 5 Cal.3d at page 764, which was endorsed by our high court in *Ricardo P.*, *supra*, 7 Cal.5th at pages 1120-1121, allowing probation officers to access defendant's cell phone and computer for drug related communications will facilitate his supervision, reform, and rehabilitation by ensuring that he does not resume trafficking. Unlike in *Ricardo P.*, this case does not involve a "probation condition that imposes a very heavy burden on privacy *with a very limited justification*." (*Id.* at p. 1124, italics added.) Accordingly, I would conclude the condition is justified under *Lent's* third prong.

III. Constitutional Overbreadth

I agree with defendant that the search condition is constitutionally overbroad. "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "It is

about how certain offenses are commonly committed and how they could be deterred by conditions of probation, including information learned in judicial education and gleaned from presiding over other cases involving the same offenses. While in light of *Ricardo P.*, it may be questionable whether a trial court judge can still rely upon such experience in imposing a sentence, here there was actual *evidence* upon which the trial court could validly rely – evidence that such devices are *commonly used* in the narcotics trafficking trade.

not enough to show the government's ends are compelling; the means must be carefully tailored to achieve those ends." (*People v. Harrisson* (2005) 134 Cal.App.4th 637, 641.)

On the record before us, *unlimited* access to all apps, including photos, geolocation, and browser history is not warranted. (See *ante*, fn. 7.) As the United States Supreme Court has noted, apps "offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime . . . ." (*Riley, supra,* 573 U.S. at p. 396 [189 L.Ed.2d 430].)

Without support for such breadth, the electronic search condition here sweeps far too broadly, in that it allows a search of all apps in defendant's electronic devices. Further, there was no information provided by the declaration indicating a *need* for geolocation tracking, such as a defendant's prior failure to inform the probation department of his true residence or keep in touch with a supervising probation officer. Nor is there a condition requiring defendant stay out of specified locations or geographic areas.

As for electronic records reflecting narcotics trafficking, my view on the validity of the search condition might be different if the trial court had imposed a separate condition prohibiting the use of electronic devices to keep records of drug transactions, and/or the expert declaration before the court had indicated what apps are commonly used for such records. Indeed, a separate condition prohibiting the use of electronic devices to maintain drug trafficking records and a more limited scope relative to specific apps would lessen the impact on defendant's privacy interest and at the same time be

more proportional to a legitimate purpose; both circumstances would factor into the third *Lent* prong's proportionality calculus.[10]

Because the electronic search condition imposed here sweeps too broadly relative to the purpose that passes the proportionality requirement of *Lent's* third prong, I would strike the condition and remand for the trial court to impose a narrower search condition, should it choose to do so.

I respectfully dissent.

/s/
MURRAY, Acting P.J.

[10] In *Ricardo P.*, three dissenting justices criticized the majority's proportionality approach as blurring the distinction between constitutional overbreadth and *Lent's* third prong. (*Ricardo P.*, *supra*, 7 Cal.5th at pp. 1138-1140, conc. & dis. opn. of Cantil-Sakauye, C.J.) The majority appeared to concede the overlap, but maintained that consideration of some of the same overbreadth factors is warranted in analyzing *Lent's* third prong given the statutory requirement that probation conditions be reasonable and the majority's conclusion that probation conditions imposing disproportional greater burdens on probationers are unreasonable. (*Id.* at pp. 1127-1128.)